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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IS/FPC/CDR 4/4 Date: 10/13/93

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Guy von Dardel, et al.,

Plaintiffs,

v.

Civil Action 84-0353

U.S.S.R.,

Defendant.

Monday, December 22, 1986
Washington, D. C.

The above-entitled matter came on for
hearing at 10:05 a.m.

BEFORE:

HON. BARRINGTON D. PARKER

APPEARANCES:

For Guy von Dardel, et al.:

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For the United States:

DAVID ANDERSON, Esq.
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Washington, D. C.

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1 precede, your honor.

2 JUDGE PARKER: All right.

3 MR. ANDERSON: As your honor knows, I am
4 David Anderson of the Justice Department, represent-
5 ing the United States.

6 The United States' appearance here this
7 morning is at the invitation of the Court, an invita-
8 tion that your honor issued because of your recogni-
9 tion that the contempt finding that the plaintiffs
10 sought against the Soviet Union might well implicate
11 foreign policy concerns.

12 I want to make it clear that I do not
13 represent or speak for the Soviet Union. The only
14 interests we are asserting here are those of the
15 United States.

16 And I'd like to take a minute, if I
17 could, to describe to your honor what those interests
18 are.

19 In the first place, the United States has
20 an interest in a uniform and what we believe to be a
21 ---

22 JUDGE PARKER: Mr. Anderson, tell me
23 this. It is suggested in the plaintiffs' papers that
24 your office well knew of what was going on in this
25 case, but then you just sat back and rested on your

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1 oars.

2 What reason do you give for that?

3 MR. ANDERSON: Well, there was no occa-
4 sion, your honor, for the United States to appear in
5 this case. We certainly had no notion prior to your
6 honor's default judgment of what the Court's decision
7 might be. We do not routinely appear in cases, even
8 though they involve foreign sovereigns. And then
9 following the judgment, until your honor issued an
10 invitation, again there was no procedural occasion
11 for the United States to state its views.

12 JUDGE PARKER: Well, now, the government
13 suggests that in other cases that you've been more
14 than an idle bystander, that you've taken some ini-
15 tiative in the cases.

16 MR. ANDERSON: There have been some cases
17 where the United States has stated its views. Now,
18 what has happened in some cases--the Jackson case, in
19 particular, I'm familiar with ---

20 JUDGE PARKER: Which is that? The Nige-
21 rian case?

22 MR. ANDERSON: No, that's the Chinese
23 bonds case down in Alabama which the Eleventh Circuit
24 has now rendered a decision on.

25 But in that case the United States

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1 | mounted a diplomatic effort much like that involved
2 | in this case with the Soviets to try to get the
3 | Chinese to appear in court. And it was in the nature
4 | of the agreement finally struck that the Chinese
5 | agreed to appear, if the United States would state
6 | its views that it should be heard.

7 | JUDGE PARKER: Did you mount a similar
8 | initiative in this case?

9 | MR. ANDERSON: We did, your honor. The
10 | United States repeatedly tried to get the Soviet
11 | Union to appear by counsel and present its defenses
12 | to this court. The Soviet Union continued to view it
13 | as a matter for resolution between the governments,
14 | and, as you know, asserted its immunity by means of a
15 | diplomatic note, which your honor is quite correct is
16 | not the right way to do it.

17 | But we think under the Verlinden case
18 | that even though a foreign sovereign does not appear
19 | in a case, the Court still has an affirmative obliga-
20 | tion to look at the Foreign Sovereign Immunities Act
21 | to determine that immunity is unavailable.

22 | JUDGE PARKER: And what was the other
23 | case where you took the initiative?

24 | MR. ANDERSON: I believe in Sideman the
25 | United States filed an appearance to urge the Court

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1 to allow the foreign sovereign to present its defen-
2 ses.

3 JUDGE PARKER: And what government was
4 that?

5 MR. ANDERSON: That was Argentina.

6 JUDGE PARKER: Were you representing the
7 Department on those occasions?

8 MR. ANDERSON: In the Jackson case I did
9 represent the Department.

10 JUDGE PARKER: What steps did you take to
11 invite the Chinese government to do anything?

12 MR. ANDERSON: Well, there were repeated
13 contacts both in Washington and Beijing on that case.
14 And I believe the same to be true here, that there
15 have been discussions both by the American embassy in
16 Moscow and at the State Department here in Washington
17 with the Soviets, urging them to appear, telling them
18 that the FSIA provided that they should present their
19 defenses in court.

20 But the mere fact that a foreign sover-
21 eign doesn't do that does not relieve the Court of
22 its obligation to consider whether it has jurisdic-
23 tion, as your honor did. Your honor went on, after
24 finding that their non-appearance represented a wai-
25 ver of sovereign immunity, to state other theories.

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1 JUDGE PARKER: Did you receive an invita-
2 tion from the Court in either of those two cases to
3 make representations?

4 MR. ANDERSON: Not to my knowledge. We
5 did not in Jackson, and I'm not certain about
6 Sideman. But I don't think so.

7 JUDGE PARKER: All right, proceed.

8 MR. ANDERSON: Well, I did want to state
9 at the outset what the United States interest was in
10 this case, because the plaintiffs have made a bit of
11 an issue of it, and, as I say, the first is in the
12 application of the Foreign Sovereign Immunities Act,
13 which is an Act that is very important to the United
14 States government.

15 And that Act, of course, is crucial to
16 the contempt motion before your honor in a couple of
17 ways.

18 JUDGE PARKER: Are you saying that the
19 Court has no jurisdiction in this matter under the
20 FSIA?

21 MR. ANDERSON: That would be our view,
22 yes.

23 JUDGE PARKER: Go on.

24 MR. ANDERSON: First of all, the FSIA was
25 an attempt by Congress to balance the interests of

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1 foreign states against those of private individuals
2 who might have legal controversies with them. And to
3 the extent that these private interests may become
4 overbalanced by judicial decisions, the United States
5 is going to have problems with its allies and adver-
6 saries alike. This can range from diplomatic pro-
7 tests over perceived unfair treatment to the asser-
8 tion of reciprocal ---

9 JUDGE PARKER: Well, that doesn't mean
10 that it has no jurisdiction because they may protest.

11 MR. ANDERSON: No, that's absolutely
12 right. I'm not talking right now about jurisdiction;
13 I am talking about what the interests of the United
14 States are. And if you want me to pass the jurisdic-
15 tion ---

16 JUDGE PARKER: No, no, I want to hear you
17 fully.

18 MR. ANDERSON: Well, as I say, our first
19 interest is that the FSIA be applied correctly, be-
20 cause it can create foreign policy problems for the
21 United States if it's not.

22 And I think a related concern is that any
23 interpretation of the FSIA or the Alien Tort Act that
24 goes beyond what we think Congress had in mind would
25 have the Court's involved in what are essentially

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1 political disputes which should be for resolution by
2 diplomatic means by the governments involved.

3 So there is really a separation-of-powers
4 component to our concern on that score.

5 Now, I realize that we have not in this
6 case pointed to any specific and narrow foreign poli-
7 cy concern that might result if your honor enters a
8 finding of contempt.

9 JUDGE PARKER: It's completely barren,
10 it's completely barren--I'm left to guess.

11 MR. ANDERSON: Well, we are left to guess
12 as well. It's simply a matter of speculation. We
13 cannot state exactly what would happen. That's not
14 to say that nothing would happen. In fact, I think
15 we suggest a couple of possibilities ---

16 JUDGE PARKER: Did you articulate that in
17 the other two cases?

18 MR. ANDERSON: In the other two cases
19 there was more that we could point to. In this case
20 we cannot point to anything specific. But what I am
21 trying to get at is that these more general concerns
22 are very real and substantial and we think that the
23 Court should take them into account.

24 [Pause]

25 Your honor, I think where I was was to

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1 deal with the plaintiffs' suggestion that the United
2 States' position in this proceeding violates the
3 spirit of the Sovereign Immunities Act, and we think
4 that's just wrong.

5 It's true that the Foreign Sovereign
6 Immunities Act was passed in part to get the State
7 Department out of the business of making determina-
8 tions of sovereign immunity and to end the political
9 pressures that that at one time put upon the State
10 Department.

11 But we are not in this case supporting
12 any executive determination of sovereign immunity.
13 We recognize that that ---

14 JUDGE PARKER: Do you gather that from
15 what the plaintiffs say in their papers?

16 MR. ANDERSON: They did say that.

17 JUDGE PARKER: They did?

18 MR. ANDERSON: They did. But we under-
19 stand that the decision on sovereign immunity is
20 solely one for your honor, for this Court. We are
21 here simply to urge interpretations of the Foreign
22 Sovereign Immunities Act and the Alien Tort Act that
23 we think should be applied across the board to all
24 sovereigns. And we are not here because of any
25 pressure by the Soviet Union. We are here only in

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1 response to your honor's invitation to present our
2 views here, and because we think that the foreign
3 policy interests involved are very important ones.

4 The statement of interest we submitted
5 broke the question asked by your honor down into two
6 parts: first, is contempt a proper remedy under the
7 Foreign Sovereign Immunities Act against a foreign
8 state; and, second, because a finding of civil con-
9 tempt needs underlying jurisdiction to sustain it, we
10 have addressed the jurisdictional bases for this
11 action.

12 The premise that we start from on both
13 these questions is that the Foreign Sovereign Immuni-
14 ties Act is the sole and exclusive basis for juris-
15 diction against foreign states in the courts of the
16 United States. That is the teaching of the Verlinden
17 case that the Supreme Court decided, and a number of
18 other courts have said the same thing.

19 I want to address the Alien Tort Claims
20 Act very briefly later, but for now let me focus on
21 the FSIA.

22 There are two reasons under that Act why
23 we don't think that contempt is a proper remedy. The
24 first has to do with the structure of the Act, and
25 the second has to do with the specific words of the

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1 | tort exemption.

2 | The FSIA is a comprehensive scheme for
3 | suits against foreign states. It not only regulates
4 | the substantive and procedural questions that arise
5 | prior to a judgment, but it contains very specific
6 | provisions for post-judgment remedies. Like the rest
7 | of the Act, those provisions start with a strong
8 | presumption of sovereign immunity and then list ex-
9 | ceptions.

10 | Now, I don't understand the plaintiffs to
11 | contend that contempt is one of the specific excep-
12 | tions in the Act. What they do is they rely on three
13 | or four sentences in the legislative history where
14 | the--I guess it's the House report which talks about
15 | the possibility of a fine for violation of an injunc-
16 | tion. So there is a question about what that cryptic
17 | reference in the legislative history means.

18 | Of course, the principal purpose of the
19 | FSIA was to codify the restrictive theory of sov-
20 | ereign immunity. That is that the commercial activi-
21 | ties of foreign states and their instrumentalities
22 | would not be immune from jurisdiction.

23 | So we could see circumstances in a
24 | strictly commercial context where a court might enter
25 | an injunction against a trading company of a foreign

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1 state, for example, in the nature of requiring speci-
2 fic performance of a contract or to restrain the
3 delivery of contested goods. And, in fact, the cited
4 paragraph of the legislative history mentions speci-
5 fic performance.

6 So it's this type of traditional equit-
7 able remedy in a commercial context that we think
8 Congress had in mind with that language. And fines
9 for contempt might conceivably be a remedy in a case
10 like that.

11 But if any confirmation is needed that
12 Congress by contrast in a case like this didn't
13 contemplate injunctive relief, it's in the specific
14 language of another part of the Act, Section
15 1605(a)(5). That's the tort exception to sovereign
16 immunity. And that subsection denies sovereign immu-
17 nity in certain types of court suits--and I quote--
18 "in which money damages are sought against a foreign
19 state."

20 Now, if the FSIA is the sole source of
21 jurisdiction against foreign states, as we think the
22 Supreme Court has held that it is, then Congress
23 specifically determined that injunctions were not an
24 appropriate remedy in tort cases.

25 So the bottom line is that attachments

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1 and executions were specifically provided as the
2 remedy for money judgments in certain kinds of cases,
3 and money damages were the only remedies allowed in
4 tort cases.

5 So we don't think that Congress autho-
6 rized injunctions in cases like this, or contempt as
7 a remedy to enforce them.

8 Now, we've also raised questions ---

9 JUDGE PARKER: What is the extent of the
10 relief if it were a commercial activity?

11 MR. ANDERSON: Well, if it were a commer-
12 cial activity, Sections 1610 and 1611 allow certain
13 restricted kinds of execution and attachment against
14 foreign states and their instrumentality. For the
15 most part ---

16 JUDGE PARKER: Namely, what?

17 MR. ANDERSON: Well, for the most part,
18 property that is used in commercial activities can be
19 seized. It would be typical in those respects to the
20 ordinary kinds of remedies that you could get against
21 private litigants, but there are a lot of restric-
22 tions put on it, and there are more restrictions put
23 on executions and attachments against foreign states
24 themselves than there are on instrumentalities like
25 trading companies.

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1 But those are in commercial cases. If
2 your honor looks at the Letelier decision in the
3 Second Circuit where they considered the appropriate-
4 ness of execution against the assets of foreign
5 states, in tort cases the Second Circuit at least
6 suggested that this is one place where Congress may
7 have created a right without a remedy.

8 It's kind of complicated, the execution
9 and attachment provisions.

10 JUDGE PARKER: Now, the Letelier case was
11 under which Act?

12 MR. ANDERSON: That was under the FSIA,
13 the tort exemption. This case does not purport to be
14 under that exemption. I think because the tort did
15 not happen in the United States, the plaintiffs felt
16 that they didn't come within that tort exemption.

17 Now, to move on to jurisdiction, we've
18 discussed that, because, of course, the validity of a
19 contempt finding depends on jurisdiction. And we
20 think that the Court has authority under Rule
21 12(h)(3) to re-examine its decision on that subject.
22 In a number of other cases that we've talked about,
23 the courts have, when new arguments were raised,
24 reconsidered jurisdictional decisions against foreign
25 states. So there is ample precedent, if your honor

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1 decides to take a second look.

2 JUDGE PARKER: Which case do you rely
3 upon?

4 MR. ANDERSON: Well, Jackson, Siderman--
5 indeed, Judge, Joyce Green in Letelier considered
6 jurisdiction a second time when a diplomatic note was
7 presented by the Argentinians to the State Depart-
8 ment.

9 JUDGE PARKER: That was after the Second
10 Circuit?

11 MR. ANDERSON: That was before.

12 JUDGE PARKER: Before the Second?

13 MR. ANDERSON: The D. C. Circuit decided
14 the underlying case, and then the plaintiffs there
15 tried to execute on property that was in the Second
16 Circuit, so that's why that court got involved.

17 JUDGE PARKER: I understand now.

18 MR. ANDERSON: Now, I've already covered
19 the point that the mere non-appearance by a foreign
20 sovereign, according to the Supreme Court in
21 Verlinden, is not a basis for finding that they have
22 waived sovereign immunity.

23 I think, unfortunately, though, the non-
24 appearance of the Soviets had another effect in this
25 case, and that was, of course, that your honor only

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1 | heard one side of the arguments. Now, I'm not sug-
2 | gesting that the plaintiffs did anything unfair, but,
3 | of course, any court is at a serious disadvantage
4 | when it only hears half the arguments.

5 | So let me move on to the other three
6 | bases. Your honor did not limit the Court's decision
7 | to simply finding that the non-appearance waived
8 | sovereign immunity; your honor did discuss three
9 | other possible theories of waiver under the Foreign
10 | Sovereign Immunities Act.

11 | The first is the question of whether a
12 | substantive violation of international law waives
13 | sovereign immunity. And I think there are a couple
14 | of pertinent points to make on this issue.

15 | JUDGE PARKER: And what was the substan-
16 | tive violation here?

17 | MR. ANDERSON: I believe it was the vio-
18 | lation of the norms of international conduct in dis-
19 | regarding the diplomatic safe conduct.

20 | Now, when Congress said that it meant to

21 | ---

22 | JUDGE PARKER: It violated the rights of
23 | a diplomat.

24 | MR. ANDERSON: In part. I think there
25 | was more to it than that, but that was certainly the

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1 guts of it.

2 When Congress said that it meant to in-
3 corporate standards of international law into the
4 Foreign Sovereign Immunities Act, we think it meant
5 no more than the restrictive theory of sovereign
6 immunity that it was codifying was consistent with
7 international law practice. To go beyond that and to
8 hold that immunity is waived when there is a viola-
9 tion of international law, even when the test is a
10 serious or a gross violation of recognized interna-
11 tional standards, really makes jurisdiction turn on
12 the merits of the case. And it also threatens to
13 turn the courts of this country into forums for the
14 resolution of the kinds of international problems
15 that the United States considers to be diplomatic in
16 nature.

17 Now, it may well be, as your honor sug-
18 gested, that under international law the United
19 States could assert jurisdiction over violations of
20 international law. But Congress, in the FSIA, did
21 not decide to do that, and Congress, of course,
22 regulates the jurisdiction of the District Courts.

23 So Congress specified the exceptions to
24 sovereign immunity that it wanted to created juris-
25 diction, and violation of international law was not

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1 one of them.

2 We don't think that the act-of-state
3 doctrine has anything to do with it either because
4 that is a prudential doctrine not a jurisdictional
5 one, and it simply reflects the courts' reluctance to
6 adjudicate acts that a foreign state performs within
7 its own territory.

8 Now, sometimes courts do adjudicate such
9 controversies, even though there is this act-of-state
10 doctrine. But that doesn't mean they have jurisdic-
11 tion, and first they have to look to find if they
12 have jurisdiction.

13 So where we come out on this issue is
14 that Congress did not intend violations of interna-
15 tional law to be a basis for waiving sovereign immu-
16 nity without more--even violations as serious as the
17 one ---

18 JUDGE PARKER: What specific authority do
19 you have for this? The Act itself?

20 MR. ANDERSON: Yes, the Act itself has
21 specific exemptions, and it nowhere mentions interna-
22 tional law. And if the one basis for assuming that
23 international law creates jurisdiction is the sugges-
24 tion that Congress wanted to follow international
25 law, we think there is an alternate explanation for

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1 that which really makes much more sense in light of
2 the structure of the Act. Congress's codification of
3 the restrictive theory was consistent with interna-
4 tional law, as they understood it. And we think that
5 that has to be all that they mean.

6 Now, the next issue is whether, indepen-
7 dently of the FSIA, the Soviet Union has waived
8 sovereign immunity, either explicitly or implicitly,
9 pursuant to some international agreement. If there
10 is such an agreement waiving immunity, then the FSIA
11 would provide jurisdiction.

12 We think that Congress in Section 1604
13 was referring to agreements dealing with the subject
14 of immunity, or at least the jurisdiction or choice
15 of law kinds of subject. An explicit waiver might be
16 a treaty in which country X says it waives its immu-
17 nity with respect to particular kinds of claims; an
18 implicit waiver might be where country X says that
19 certain claims may be adjudicated in accordance with
20 the laws of country Y. That is certainly the drift
21 of the legislative history. Those are the kinds of
22 examples that Congress gave.

23 And we don't think that Congress intended
24 any broader interpretation of Section 1604.

25 Most treaties and international

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1 | agreements, your honor, do not give rise to private
2 | rights of action; they can't be sued on by private
3 | parties. They really establish rights and obliga-
4 | tions between governments.

5 | And the only agreements that establish
6 | rights in private persons are what are called self-
7 | executing treaties. These are agreements that con-
8 | tain rules of laws that courts can apply directly in
9 | cases before them, and they don't require legislative
10 | action to implement them.

11 | Now, the Vienna Convention and the 1973
12 | Convention on internationally protected persons are
13 | not self-executing. And in fact Congress passed
14 | legislation to implement the 1973 Convention; they
15 | passed the criminal law ---

16 | JUDGE PARKER: Was a question raised in
17 | the Letelier case about a private right of action at
18 | any point, subsequent point?

19 | MR. ANDERSON: At any subsequent point?
20 | You mean in the Second Circuit?

21 | JUDGE PARKER: Yes.

22 | MR. ANDERSON: I don't think that was an
23 | issue there. The only issue there was ---

24 | JUDGE PARKER: Was the execution?

25 | MR. ANDERSON: Yes. My basic point is

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1 that to imply a waiver on the basis of a violation of
2 an international agreement would have the courts
3 enforcing non-self-executing treaties which are real-
4 ly political agreements between the governments in-
5 volved, and at the place where the courts have tradi-
6 tionally allowed the Executive Branch; that is, the
7 Executive Branch has responsibility for managing the
8 treaty relations of the United States. It's only in
9 self-executing treaties where the courts use that
10 treaty to determine private rights before them that
11 the courts have any role.

12 So Section 1604 really, as a constitu-
13 tional matter, must only refer to waivers of sov-
14 ereign immunity in self-executing treaties that deal
15 with subjects like sovereign immunity, jurisdiction,
16 choice of law.

17 The last FSIA jurisdictional issue is
18 whether, under Section 1605(a)(1), a violation of a
19 treaty or other international obligation constitutes
20 a waiver of sovereign immunity. And we see this
21 issue as being similar to the analysis that the Court
22 should apply under Section 1604.

23 Just because a foreign state enters into
24 a government-to-government agreement where it agrees
25 to undertake certain obligations vis-a-vis another

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1 government to adhere to certain standards of conduct,
2 or whatever, doesn't mean that it agrees to be bound
3 by decisions of the courts of that country, if it's
4 accused of violating those agreements. Again, this
5 would have the courts enforcing all types of treaty
6 rights that properly belong to the United States and
7 not to private individuals and which are for the
8 Executive Branch to vindicate under our constitu-
9 tional system.

10 Just in closing I want to say a few words
11 about the Alien Tort Act, very quickly. First of
12 all, as I said before, we think the FSIA is the
13 exclusive basis for jurisdiction against foreign
14 states, so that the Alien Tort Act could not provide
15 jurisdiction against foreign states. And all the
16 other courts that have considered that question have
17 said that it does not provide jurisdiction against
18 foreign states--and that includes at least two judges
19 on the panel in the D. C. Circuit in the Hanoch Tel-
20 Oren case; both Judge Edwards and Judge Bork said
21 that the Alien Tort Act could not provide jurisdic-
22 tion against Libya in that case, although it is
23 somewhat buried in the discussions there. In Judge
24 Edwards' opinion it's at 726 F. 2nd at 776, Note 1,
25 and in Judge Bork's it's at page 805 at Note 13.

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But historically that makes sense, because at the time the Alien Tort Act was enacted, in 1789, Congress could not have thought that it would apply to foreign states. The universal practice at that time was to grant all foreign states absolute sovereign immunity, and that rule didn't change in the United States until 1952.

Giving the Alien Tort Act that interpretation does not deprive it of meaning, because what Congress probably had in mind were offenses like piracy, possibly even violation of diplomatic safe conducts, but when done, as they were at the time, by private persons.

All this leads us to believe that the Tort Act does not provide jurisdiction against foreign states. It's the FSIA or nothing, and we think the Court ought to re-examine its jurisdictional holding under that statute.

It's unfortunate, your honor, that the United States has to be taking these positions in a case involving the Soviet Union where the Soviet Union failed to appear and where the underlying conduct is so abhorrent.

But we see the broader interests of the United States as lying with an interpretation of the

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1 FSIA that reflects Congress's balancing of the in-
2 terests and the proper constitutional roles of the
3 political branches and the courts.

4 We very much appreciate this opportunity
5 to present the views of the United States.

6 JUDGE PARKER: Mr. Anderson, the State
7 Department is on this submission of yours, is that
8 correct?

9 MR. ANDERSON: Yes.

10 JUDGE PARKER: And you, of course, speak
11 for your client with respect to the State Department.

12 MR. ANDERSON: Yes, I do.

13 JUDGE PARKER: Are you speaking with one
14 voice?

15 MR. ANDERSON: We are.

16 JUDGE PARKER: Would you answer this
17 question. On page 2 of your submission--do you have
18 it in front of you--the last two lines at the bottom.

19 MR. ANDERSON: Yes.

20 JUDGE PARKER: Who is this Munroe Leigh?
21 Is that the way you pronounce his name or is it
22 Munroe "Lay"?

23 MR. ANDERSON: No, it's "Lee," I believe.
24 He was, at the time he wrote the letter, the legal

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1 JUDGE PARKER: And he's on the contempo-
2 rary scene now?

3 MR. ANDERSON: He's no longer with the
4 State Department.

5 JUDGE PARKER: No, but he's on the con-
6 temporary scene--he's living.

7 MR. ANDERSON: Yes.

8 JUDGE PARKER: I'd like to see that let-
9 ter.

10 MR. ANDERSON: I'll provide a copy.
11 Thank you.

12 MR. STRUVE: May it please the Court, my
13 name is Guy Struve, I'm from Davis, Polk & Wardwell,
14 and, together with a number of other people who have
15 volunteered their services, we represent the plain-
16 tiffs.

17 JUDGE PARKER: I see that.

18 MR. STRUVE: I'd like, before I begin,
19 your honor, if I may, to complete the response to a
20 number of questions that your honor asked which were
21 incompletely answered.

22 The first one is whether the government
23 has been on notice of every step in this lawsuit.

24 Mr. Anderson did say that the government was fur-

25 nished with copies of the original pleadings and of

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1 the motion for a default judgment. There's more than
2 that. They were furnished in November 1985, less
3 than a month after your honor's decision, with a copy
4 of that decision. They were furnished in April 1986,
5 the same day that we filed this motion for contempt
6 which is now being heard by your honor, with a copy
7 of that motion.

8 So that at every important step in the
9 lawsuit the government has been on full notice of
10 what the Court has been doing and of what the plain-
11 tiffs have been trying to accomplish. And we think
12 that their inaction speaks for itself.

13 JUDGE PARKER: Have you had any dialogue
14 with them?

15 MR. STRUVE: No, your honor. We sought a
16 dialogue; we did not have any dialogue from them, or
17 any response, except to acknowledge what we had sent
18 them, until after your honor's letter.

19 The next question I'd like to pick up on,
20 your honor, is whether the government was invited by
21 the courts to come in in the Jackson and Sideman
22 cases. Mr. Anderson correctly said that they were
23 not so invited; they came in uninvited.

24 There's another very important distinc-
25 tion which your honor is aware of, and that is that

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1 in both Jackson and Siderman the People's Republic of
2 China and the Republic of Argentina came into the
3 court themselves and made the jurisdictional argu-
4 ments themselves, which the State Department had told
5 them they had to do. That's in stark contrast to
6 this case.

7 As far as we know--and Mr. Anderson has
8 not denied this--this is the first case in the ten
9 years since the enactment of the Foreign Sovereign
10 Immunities Act in which the government, without the
11 foreign government itself coming into the case in any
12 form, has interceded to present the jurisdictional
13 arguments that, under the Act, should be presented by
14 the foreign government itself.

15 JUDGE PARKER: Well, what inference do
16 you want me to draw from that?

17 MR. STRUVE: I was going to get to that
18 when I come in my argument to the subject of juris-
19 diction, and I think it goes to the question of what
20 weight the Court should give to that submission.

21 The next thing I'd like to pick up on,
22 your honor, is your honor asked it had been held in
23 the Letelier case that a private right of action can
24 be implied and has been implied from the ---

JUDGE PARKER: Or whether it had been

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1 raised.

2 MR. STRUVE: Well, and Mr. Anderson an-
3 swered that that had not been decided by the Second
4 Circuit, but, as your honor knows--this was mentioned
5 at page 254 of your honor's prior decision--the deci-
6 sion of this Court in the Letelier case expressly
7 held that a private right of action arises from the
8 criminal statutes, which have been enacted by Con-
9 gress to carry out the conventions to protect the
10 foreign diplomats, that is to say, 18 U.S.C. Sections
11 1116 and 1201.

12 And I might add that the government in
13 its brief implies that those statutes are limited to
14 cases in which the act was committed either by a
15 United States national or within the United States.
16 Looking at the sections themselves will show that's
17 not so; it expressly covers any defendant found in
18 the United States regardless of where the act was
19 committed, regardless of the nationality of the vic-
20 tim and of the perpetrator.

21 JUDGE PARKER: You are referring now to
22 Title 18?

23 MR. STRUVE: That's right, it's in Title
24 18, your honor, so that even if more than a treaty is
25 required, even if some implementing legislation is

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1 required, that implementing legislation, as the Court
2 has already held, exists in this case.

3 What I'd now like to do, your honor, is
4 address the two great questions that Mr. Anderson has
5 addressed in the same order in which he addressed
6 them, starting with the question of contempt.

7 I think it's common ground between us and
8 the government that the traditional standards for
9 civil contempt are met here. We have a judgment of
10 the Court which was clear and specific as to what it
11 required; we have notice of that judgment on the part
12 of the defendant; we have an unequivocal refusal by
13 the defendant to comply with that order. Under those
14 circumstances, no more showing is required under the
15 law for civil contempt, at least in a domestic con-
16 text.

17 As we understand it, the government makes
18 two arguments in response to that. The first argu-
19 ment is that as a matter of law civil contempt is
20 unavailable under the Foreign Sovereign Immunities
21 Act. And, as your honor knows, in our submission
22 there are a number of reasons, each independently
23 sufficient, why that cannot be so.

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24 The first is that Section 1606 of the
25 Foreign Sovereign Immunities Act expressly provides

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1 that, with the single exception of punitive damages,
2 which are available only in part, a foreign sov-
3 ereign, under the Foreign Sovereign Immunities Act,
4 is liable in the same manner and to the same extent
5 as a private person.

6 To us, the language is clear that a fo-
7 reign sovereign ---

8 JUDGE PARKER: What language are you
9 relying on?

10 MR. STRUVE: The language in 1606, your
11 honor.

12 JUDGE PARKER: Yes, cite it.

13 MR. STRUVE: I'm starting with the begin-
14 ning of the section, your honor. "As to any claim
15 for relief with respect to which a foreign state is
16 not entitled to immunity, under Section 1605 or Sec-
17 tion 1607 of this chapter, the foreign state shall be
18 liable in the same manner and to the same extent as a
19 private individual under like circumstances." And
20 then it goes on with a proviso as to punitive da-
21 mages. I can read the proviso, but I represent to
22 your honor that it deals only with punitive damages.

23 The second independently sufficient
24 ground we rely on, your honor, is the legislative
25 history. The legislative history--and Mr. Anderson

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1 | said that he thought this was the House report; it's
2 | the Senate report, too; they are identical on this
3 | point--expressly says that in an appropriate case the
4 | Court may grant injunctive relief or specific-perfor-
5 | mance relief. And then it goes on in that same
6 | paragraph to say that there may be some limitations
7 | on the Court's ability to enforce that. And on the
8 | subject of fines what it says is that fines for
9 | violations of injunctions by a foreign government may
10 | be unenforceable, if there is some immunity under the
11 | execution provisions of the Act.

12 | Now, what that says to us is that Con-
13 | gress expressly contemplated that there could be
14 | fines for violation of an injunction. And the gov-
15 | ernment says, well, that doesn't tell us that civil
16 | contempt is available; they didn't say what kind of
17 | fines they meant, they didn't say on what findings
18 | they would be granted.

19 | Your honor, it seems clear to us that,
20 | unless "fines for violation of an injunction" means
21 | civil contempt, it means criminal contempt. Those
22 | are the only two means by which one has fines for
23 | violation of an injunction.

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24 | We are not suggesting that criminal con-
25 | tempt should be available against a foreign

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1 sovereign, at least until civil contempt has been
2 tried and has failed.

3 But those are the only two possibilities.
4 If it doesn't mean at least that, then the congres-
5 sional reference to fines for violation of an injunc-
6 tion means nothing.

7 The third ground, your honor, why we
8 submit that the contempt power must exist in the
9 Court is that, stepping back from the Act in its
10 legislative history, it's a fundamental constitu-
11 tional principle that the courts recognized beginning
12 in the early 19th century--Justice Marshall, for
13 example--that inherent in the power of a court to
14 adjudicate controversies and grant an injunction is
15 the power to apply contempt remedies if the injunc-
16 tion is disobeyed.

17 Under the Constitution, Congress may
18 limit that power so long as it does so expressly--and
19 there is no express limitation in the FSIA--but it
20 may not eliminate it.

21 So that's a third ground we submit, your
22 honor, why the power to enter a fine for civil con-
tempt must exist in this Court.

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Finally, your honor, the purpose of Con-
gress in enacting the FSIA, we submit, should be

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1 considered. Clearly, Congress intended that injunc-
2 tions could be rendered against foreign sovereigns
3 under the FSIA. That's clear from the legislative
4 history, and the government does not dispute that.
5 So that if Congress intended to withhold the contempt
6 remedy, then it has to be concluded that they inten-
7 ded to provide a remedy which the courts could not
8 enforce, which makes nonsense of the congressional
9 intent. And we submit, moreover, your honor, it
10 would raise questions under Article III of the Con-
11 stitution because a judgment that cannot be enforced
12 is an advisory opinion, and, under Article III, the
13 courts cannot grant advisory opinions.

14 JUDGE PARKER: Mr. Struve, as I listen to
15 your argument--I don't pretend to be a Shakespeare
16 scholar, but it seems to me that there is a quotation
17 that comes out of Shakespeare--I don't know what play
18 it is--but one of the actors says "And I will call
19 thee serpents from the briny deep," and the other
20 actor says "You may call them, but will they come?"

21 If I gave you the relief that you are
22 seeking, where would you go, or what do you want the
23 Court to do?

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24 MR. STRUVE: What we've asked for, your
25 honor, is an order which would find the Soviet Union

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1 in contempt, which would give a certain period of
2 time after the service by mail of that order--we've
3 suggested two weeks--for the Soviet Union to take it
4 in and reconsider.

5 JUDGE PARKER: And then what?

6 MR. STRUVE: Which after that would pro-
7 vide for a fine of an appropriate amount per day,
8 which would continue to accrue until the Court finds
9 that its judgment has been complied with.

10 If we got that far, your honor--and my
11 hope is that at that point the Soviet Union would
12 come in; that's the purpose of a civil contempt
13 fine. But if we got that far, we would then be
14 attempting to enforce the fine by execution under the
15 provisions of the Foreign Sovereign Immunities Act on
16 assets of the Soviet government, which would mean
17 that we would be coming back to your honor, or to an
18 appropriate judge in another district, for an order
19 of attachment.

20 JUDGE PARKER: How would that differ,
21 then, from the situation that the Second Circuit
22 found itself in?

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23 MR. STRUVE: It would differ, your honor,
24 because we would be relying on different grounds for
25 overcoming immunity from attachment, just as on the

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1 substantive issues we were relying on different ex-
2 emptions from immunity than were relied on Letelier.
3 In Letelier the exemption that was relied on was the
4 tort exception, Section 1605(a)(5). And we relied on
5 that in our initial submission to your honor. That
6 was not a ground that your honor adopted.

7 What we have now is four completely dif-
8 ferent grounds, and each one of the grounds that your
9 honor did rely on has its express counterpart in the
10 exceptions to immunity from attachment.

11 So the way we see it, the same issues of
12 immunity that have already been decided with respect
13 to the merits of the action will arise again, and, we
14 submit, should be decided the same way, at the at-
15 tachment phase. Again, if we have to reach attach-
16 ment, it is not our purpose, your honor, to collect
17 funds. The only reason we suggest fines to your
18 honor is that, on behalf of the plaintiffs, we be-
19 lieve it's deeply important that the Court's order be
20 obeyed. In fact, I should mention, your honor, be-
21 cause it may be a question in your honor's mind, that
22 one might wonder why have we not taken that \$39-
23 million damage judgment, which the Court entered more
24 than a year ago, and gone out and executed on Soviet
25 assets for them.

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1 JUDGE PARKER: That's a good question.

2 Why not?

3 MR. STRUVE: And the answer is, your

4 honor ---

5 JUDGE PARKER: Counsel, the Court will

6 take a short recess.

7 [Brief recess]

8 JUDGE PARKER: Very well, Mr. Struve, I
9 think when you left off you were saying that you were
10 going to execute on the judgment or something. Was
11 it to that effect?

12 MR. STRUVE: What I was saying, your
13 honor, was that there was a reason why we had not
14 just gone ahead in November of 1985, when the Court's
15 amended judgment was entered, and executed right away
16 on the \$39-million judgment. And that reason is that
17 from the standpoint of the plaintiffs, who are the
18 family and the legal guardian of Raoul Wallenberg, by
19 far the most important object of this case is to get
20 him back, or his remains, if he's dead, and to get a
21 true accounting of his fate.

22 The \$39 million is not unimportant, but
23 compared to that, it is relatively unimportant. So
24 that our concern was, your honor, and remains, that
25 for us to have gone ahead right away and executed on

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1 the \$39-million damage award would have put the focus
2 of the litigation on exactly the point where it ought
3 not to be, and that the real focus should be on
4 exhausting every opportunity open to us and the Court
5 to obtain compliance with the injunctive relief awarded,
6 which was the primary purpose of the lawsuit.

7 That's the reason.

8 I have, your honor, some other topics in
9 the contempt area, going beyond the legal points
10 which I've discussed. One of them is a mixed question
11 of fact and law. It is the suggestion in the
12 government's brief that in order to make a civil
13 contempt award against a foreign sovereign, the Court
14 has to make a finding that there has been some specific
15 scorn and contempt expressed for the Court's
16 judgment by the foreign sovereign rather than some
17 kind of principled determination that the foreign
18 sovereign will never appear in U. S. courts.

19 We submit, your honor, that that is not
20 the law. Civil contempt doesn't require, despite the
21 name, which goes back to the Middle Ages, an actual
22 factual finding of scorn and contempt; it merely
23 requires deliberate violation of the Court's judgment.
24 But unfortunately, your honor, we submit that
25 if scorn and contempt were required, the Soviet note,

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1 | which unaccountably is not mentioned in the govern-
2 | ments's statement, supplies what is needed for that
3 | finding. And it's attached at Tab E to my affidavit
4 | from April of 1986.

5 | In the English translation made by the
6 | State Department, it reads "It is quite obvious that
7 | the American court, in rendering its decision, was
8 | not guided at all by legal rules but by other mo-
9 | tives."

10 | Now, obviously, it's the Russian text
11 | that is authoritative, and I can tell you, your
12 | honor, that while I would have translated some of the
13 | words by a synonym, the sense is accurately conveyed
14 | by what I read from the State Department's transla-
15 | tion.

16 | In addition, your honor, as your honor
17 | noticed in your honor's ---

18 | JUDGE PARKER: What are the words of
19 | significance, "by other motives"?

20 | MR. STRUVE: That's correct. In the
21 | original Russian--this is at the top of the last page
22 | of Tab E--it says [statement in Russian], and [state-
23 | ment in Russian] literally is "not by legal norms,"
24 | and then the word [Russian word] is a word usually
25 | translated "but," but it should be translated "and

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1 not." The sense it carries is that what is to follow
2 is in contradiction of what's just been said. And
3 then [Russian word] is just a word that means
4 "other." So "by other motives," the implication
5 being in contradistinction to legal motives. That's
6 what it says.

7 In addition, your honor, the Court found
8 in its prior decision that the Soviet Union knows
9 what the procedures are for raising its defenses
10 properly under the Foreign Sovereign Immunities Act,
11 and has appeared in other cases to raise those defen-
12 ses. So we are not dealing with a defendant that has
13 a consistent record of never appearing in American
14 courts for reasons of principle; we are dealing with
15 a defendant which in this case has not appeared, and
16 has stated its reasons for not appearing.

17 Now, we emphasize, your honor, we don't
18 believe your honor needs to make a finding of scorn
19 and contempt; all we believe is needed is a finding
20 of knowing violation of the Court's order, and that's
21 perfectly clear.

22 Let me now, your honor, go on to the
23 question of the foreign policy implications. This is
24 something that your honor discussed this morning with
25 Mr. Anderson, and Mr. Anderson stated--and this is an

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1 | accurate summary of what's in the government's state-
2 | ment--that whatever specific foreign policy implica-
3 | tions there may be in this case are left as a matter
4 | of speculation.

5 | And we submit that in that kind of a case
6 | they should not be given controlling weight. What
7 | should govern is the facts and the law.

8 | JUDGE PARKER: What were the known and
9 | established facts in the other case?

10 | MR. STRUVE: You mean in Jackson, your
11 | honor, and in Sideman?

12 | JUDGE PARKER: Yes.

13 | MR. STRUVE: First of all, there were
14 | very specific facts--and in the Jackson case it was
15 | an affidavit from Secretary Shultz, who said that he
16 | had personally discussed this with the Chinese lead-
17 | ers, that there would be specific harm to American
18 | foreign policy interests if they were not permitted
19 | to be heard. That was the issue that was involved in
20 | those cases, just letting ---

21 | JUDGE PARKER: If they were not imme-
22 | diately heard.

23 | MR. STRUVE: Exactly. The issue there
24 | was that they had suffered default judgments to oc-
25 | cur. The reasonable term under Rule 60(b) of the

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1 Federal Rules of Civil Procedure, as normally inter-
2 preted, had run. Finally, the State Department had
3 persuaded China in the one case, Argentina in the
4 other case, to come in. All the State Department was
5 asking was that they be given this belated opportuni-
6 ty to be heard, and they were saying very specific-
7 ly--and they spelled it out chapter and verse in the
8 Jackson case by an affidavit from the Secretary of
9 State--that there would be specific foreign policy
10 problems if they were not heard. Nothing like that
11 in this case.

12 JUDGE PARKER: We don't even have that in
13 this case.

14 MR. STRUVE: That's right, your honor.
15 Moreover, there's something else I want to say before
16 I leave this topic, and that is that there is a
17 suggestion in the government's brief that the issue
18 presented by this case is not one that ought to be
19 dealt with in the courts, that it should be left to
20 statecraft and diplomacy.

21 Now, the Wallenberg family left this
22 issue to statecraft and diplomacy for 39 years, and I
23 am not saying, nor is the Wallenberg family, that the
24 Swedish government and the American government didn't
25 try, but the answer that the Soviet Union now

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1 | consistently gives to diplomatic approaches on the
2 | subject of Raoul Wallenberg is that they said all
3 | there was to be said in 1957 when they said he died
4 | of a heart attack in 1947 and that the matter is
5 | closed.

6 | And, again, that's in the record, because
7 | the Soviet note, which is Tab E to my affidavit,
8 | specifically says--and I am reading from the third
9 | paragraph--"In its time, in response to the corres-
10 | ponding requests of the Department of State, the
11 | Soviet side has already given exhaustive explanations
12 | with regard to the fate of Swedish citizen, R.
13 | Wallenberg, and considers the matter closed."

14 | And, again, that's not the most exact
15 | translation that could have been made, but the sense
16 | is accurate.

17 | JUDGE PARKER: Before you move from that,
18 | if Mr. Wallenberg were living, how old would he be
19 | today?

20 | MR. STRUVE: Your honor, he would be 74.
21 | But this is an age that others in his family have
22 | reached. His mother died in her early 90's, less
23 | than a decade ago, still hoping to see him. His
24 | brother is only a few years younger, and also his
25 | sister. So that if, which the evidence indicates, he

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1 was never held in the type of Gulag conditions which
2 Solzhenitsyn wrote about, but instead was in solitary.
3 confinement but physically relatively decently
4 treated in the central core of the Soviet prison
5 system, there is no reason to believe that he is not
6 alive today from any natural cause.

7 Let me, your honor, now say some words
8 about the question of jurisdiction. Your honor asked
9 me earlier, and I do now wish to give your honor a
10 full answer, what significance do we attach to the
11 fact that the Soviet Union is not here and that the
12 government is in effect making the arguments on jur-
13 isdiction which Congress intended the Soviet Union to
14 come in and make for itself?

15 Your honor, we don't wish to be dogmatic
16 about that. If the government had raised questions
17 that were truly new, as opposed to questions that had
18 been addressed by your honor in your honor's deci-
19 sion, I don't think we would be here saying that
20 under no circumstances could your honor consider what
21 they had to say. And certainly, if the Soviet Union
22 were here, under Rule 60(b) of the Federal Rules of
23 Civil Procedure, and your honor found, which candidly
24 we would urge your honor not to find, that this was
25 still within the reasonable time for questioning the

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1 original judgment under Rule 60(b), we would certain-
2 ly not say that your honor could not listen to what
3 they had to say. What we are saying, though, your
4 honor, is that, because Congress intended that the
5 State Department remove itself from this process and
6 that the foreign governments come in and address
7 themselves to the courts directly, there should be a
8 strong presumption, except in extraordinary circum-
9 stances, that that's the way it happens.

10 And we submit, your honor, that the argu-
11 ments that the government has made on jurisdiction
12 are not new arguments, and that they do not warrant
13 reconsideration of your honor's decision.

14 We've discussed those points in our
15 brief, and so what I would like to do, if I may, your
16 honor, is touch only on two specifics in the juris-
17 dictional area. One of them is an argument raised
18 for the first time by Mr. Anderson on oral argument,
19 and the other is a general point about your honor's
20 prior decision, which we believe the government has
21 insufficiently taken account of.

22 The point Mr. Anderson raised for the
23 first time on oral argument relates to Section
24 1605(a)(5), the tort exemption from the Foreign Sov-
25 ereign Immunities Act. And the argument is that

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1 because that specific exemption is limited to actions
2 for money damages, therefore everything else in the
3 Foreign Sovereign Immunities Act is limited to ac-
4 tions for money damages.

5 Like many afterthoughts, this is not a
6 happy thought. The language of the Act makes it
7 perfectly clear that that limitation to money damages
8 applies only to that one subsection, and that every
9 other exception to sovereign immunity is not limited
10 by that, so that actually this argument, when looked
11 at in the context of the structure of the Act, works
12 the other way. If Congress had wanted to say that
13 the Act as a whole should be limited to the money
14 damages, it knew how to say that. It said that in
15 Section 1605(a)(5). But it didn't say that. The
16 bases for overcoming sovereign immunity that your
17 honor has relied do not involve Section 1605(a)(5),
18 and therefore this argument is simply without merit
19 in this case.

20 The other point I would like to make,
21 your honor, is that running through the government's
22 statement and Mr. Anderson's argument to your honor
23 is an argument that somehow the Court's decision
24 recognizing jurisdiction in this case opened the
25 floodgates and that, unless the Court reverses its

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1 | decision, every alleged violation of international
2 | law by any plaintiff will be entertainable in a U. S.
3 | court.

4 | I know your honor has this very much in
5 | mind, but I think it's important to remind ourselves
6 | that the Court specifically found that this was an
7 | extraordinary and unprecedented case. It's a case
8 | where the defendant itself has admitted that the
9 | seizure and detention of Raoul Wallenberg were unlaw-
10 | ful. It's a case where the defendant has knowingly
11 | and deliberately defaulted, knowing what the proper
12 | procedures are.

13 | And, finally, it's a violation of one of
14 | the central per se rules of international law, name-
15 | ly, diplomatic immunity. And what I mean by a per se
16 | rule is that it is one of those standards that
17 | doesn't contain any questions of judgment or of rea-
18 | sonableness or of degree in its application. Anyone
19 | who interferes with the personal integrity of a dip-
20 | lomat has violated international law.

21 | I know I don't need to remind your honor
22 | that this case is an important one from a number of
23 | points of view, including to the Wallenberg family.

24 | They would not be here if they thought they had any
25 | other recourse, for the relief that your honor has

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1 | granted in this case. And that's the only reason
2 | that we are asking for the order that we are.

3 | JUDGE PARKER: Did I infer that there
4 | were some other reasons other than of interest to the
5 | Wallenberg family?

6 | MR. STRUVE: I'm sorry, your honor, I did
7 | not hear your honor.

8 | JUDGE PARKER: I gather that you didn't.
9 | I thought that you were about to say that there were
10 | several reasons.

11 | MR. STRUVE: There are, your honor.

12 | JUDGE PARKER: And you only mentioned the
13 | Wallenberg family. What are the other reasons?

14 | MR. STRUVE: Your honor, you are right to
15 | remind me. There are a myriad of reasons, but let me
16 | mention two others.

17 | One other is that it was the United
18 | States government in 1944 that initiated the effort
19 | that sent Raoul Wallenberg to Budapest. We needed
20 | somebody on the scene to do as much as could be done
21 | to save Jewish citizens of Hungary from extermina-
22 | tion. An American could not do it because we were at
23 | war with Hungary. Sweden was willing to allow us to
24 | send a Swede there with full diplomatic immunity if
25 | we could find a Swede willing to volunteer, and

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1 Wallenberg volunteered. It was for that that he was
2 made an honorary citizen--and we submit that's impor-
3 tant.

4 And I should not have forgotten, your
5 honor--now, another set of interests that is involved
6 here is that this Court has rendered a judgment, and
7 that judgment has been disobeyed. Even in a case
8 that did not involve any of the other interests this
9 one does, that interest alone is very important.

10 JUDGE PARKER: Mr. Anderson, did you want
11 to say anything briefly in reply?

12 MR. ANDERSON: Very briefly, your honor.
13 First of all, I just want to make clear we are not
14 making jurisdictional arguments on behalf of the
15 Soviet Union here. We are simply stating what the
16 United States believes to be an interpretation of the
17 Foreign Sovereign Immunities Act that Congress inten-
18 ded and that beyond which would create serious fo-
19 reign policy problems for the United States.

20 Just by way of observation, your honor, I
21 think it should be said that in at least two cases,
22 under the Foreign Sovereign Immunities Act, the So-
23 viet Union did not appear and the Court still found
24 that it was immune. One is the Prolova case in the
25 Seventh Circuit; the other was the Korean Airlines

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1 case before Judge Robinson.

2 JUDGE PARKER: Tell me this. I was in-
3 terested in Judge Robinson's case. No one entered an
4 appearance at all in that case.

5 MR. ANDERSON: No, not for the Soviets.
6 I don't know if there were other codefendants. The
7 United States was involved ---

8 JUDGE PARKER: Was that against the Ko-
9 rean Airlines? Is that the case you are talking
10 about?

11 MR. ANDERSON: It involved the Korean
12 Airlines, the shooting down of the plane, yes.

13 JUDGE PARKER: So only the plaintiffs
14 were represented there, is that it, the families? I
15 didn't look at the case to see.

16 MR. ANDERSON: I know there were related
17 proceedings against the United States that I think
18 were also dismissed, but they had nothing to do with
19 the suit against the Soviets.

20 I guess the final point I want to make,
21 your honor, has to do with your honor's question of
22 where do we go from here, what happens if your honor
23 enters this--and Mr. Struve suggests that they could
24 execute. I think that that is probably wrong, be-
25 cause there are specific exemptions for execution in

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1 the Foreign Sovereign Immunities Act, but they only
2 apply to commercial suits. There are no waivers of
3 sovereign immunity for execution or attachment in
4 tort suits, unless Mr. Struve is arguing that somehow
5 there has been a waiver here. And we would seriously
6 doubt that Congress meant to allow the kind of impli-
7 cit waiver that they have been arguing about here.

8 JUDGE PARKER: Mr. Struve, what, for
9 example, would you execute on, as a practical matter?

10 MR. STRUVE: We would be focusing, your
11 honor, on assets of the Soviet government itself
12 rather than on agencies or instrumentalities in the
13 first instance--bank accounts, real estate.

14 JUDGE PARKER: What real estate?

15 MR. STRUVE: I'd like to remain general
16 on this subject, your honor, but in and around the
17 three cities in the United States in which the So-
18 viets have diplomatic representation--namely,
19 Washington, New York, and San Francisco--are various
20 parcels of real estate which they own or which are
21 owned by their nominees. And obviously they also
22 have bank accounts.

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And those assets are, particularly the
bank accounts, commercial in the sense in which that
is used in the Foreign Sovereign Immunities Act,

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1 namely, that it's not the purpose you look at but
2 whether they are assets of a kind that a private
3 individual might also use for similar purposes.

4 And I might mention, your honor, in brief
5 response to Mr. Anderson's ---

6 JUDGE PARKER: I didn't really want you
7 to take Mr. Anderson's time.

8 Proceed, Mr. Anderson.

9 MR. ANDERSON: I think the only point I
10 was trying to make, your honor, is that the Soviet
11 Union has flouted world opinion on the Wallenberg
12 case for four decades now, and it's a little bit hard
13 to believe that as a result of a Court judgment in
14 the United States they are going to turn around and
15 suddenly own up to what they've done with respect to
16 that.

17 So really ---

18 JUDGE PARKER: You don't have a built-in
19 mentality, now, with respect to the Soviet Union, do
20 you?

21 MR. ANDERSON: Well, I think my personal
22 views are kind of irrelevant here. But I think, your
23 honor, that the only thing that can happen is sort of
24 a downward spiral in terms of attempts at execution
25 and the possibility of reciprocal action by the

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1 Soviet Union. And that's one of the reasons we say
2 we don't think the courts have a role to play in
3 determinations that go beyond what we think Congress
4 meant in the Sovereign Immunities Act.

5 Thank you.

6 JUDGE PARKER: Mr. Struve, if you wish to
7 file any kind of post-hearing memorandum, I'll consi-
8 der it.

9 MR. STRUVE: Unless your honor would like
10 a memorandum at this time, setting forth the legal
11 bases for the execution of fines against the Soviet
12 Union, it seems to me that we have covered everything
13 else adequately in our brief and the oral argument.

14 JUDGE PARKER: Let me have that latter
15 memorandum.

16 MR. STRUVE: It will be done, your honor.
17 Would January 5th be an appropriate date?

18 JUDGE PARKER: Yes, that will be fine.
19 Very well.

20 MR. STRUVE: Thank you, your honor.

21 JUDGE PARKER: Thank you very much,
22 gentlemen.

23 [The hearing concluded at 11:25 a.m.]

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